CHARLES SCHWENKE

IBLA 81-664 Decided September 22, 1982

Appeal from a decision of the Montana State Director, Bureau of Land Management, denying the protest of the designation of inventory units MT-065-266 and MT-066-256 as wilderness study areas.

Affirmed in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act -- Words and Phrases

   "Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   In order to enter the study phase of the wilderness review process, an inventory unit need not be free of all intrusions or imprints of man. Sec. 2(c) of the Wilderness Act of Sept. 3, 1964, 16 U.S.C. § 1131(c) (1976), requires only that an area generally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.

APPEARANCES: Charles Schwenke, pro se; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Charles Schwenke appeals from a decision of the Montana State Director, Bureau of Land Management (BLM), dated March 13, 1981, denying his protest of the designation of inventory units MT-065-266 and MT-066-256 as wilderness study areas (WSA's). These units, known as the Antelope Creek unit and Cow Creek unit, respectively, are located in Blaine and Phillips Counties, Montana, along the Missouri River.

The State Director's action designating the units on appeal as WSA's was taken pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131(c) (1976). Following review of an area or island, the Secretary shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

The wilderness characteristics alluded to in section 603(a) are defined in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The wilderness review process undertaken by the State Office has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's announcement of wilderness study areas marks the end of the inventory phase of the review process and the beginning of the study phase.

On November 14, 1980, BLM announced its final intensive inventory decisions in the Federal Register. 45 FR 75589. In the Cow Creek unit, 36,200 acres were designated a WSA, and 34,913 acres were dropped from further wilderness review. Appellant protested the designation of the Cow

Creek WSA, and this protest was denied. His statement of reasons charges error in the State Director's failure to acknowledge as roads two vehicle routes in the southern part of the WSA. The first route is a continuation of a road cherrystemmed by BLM in sec. 1, T. 23 N., R. 22 E., Principal meridian. The second route traverses secs. 1, 2, 3, and 4 in the same township. In each case, BLM determined that these routes did not meet BLM's criteria as a road. On appeal, appellant presents photographs of these routes and contends that the presence of manmade cuts on these routes is sufficient to qualify them as roads; evidence of machine work appears on each route, appellant further contends.

[1] In determining whether a particular vehicle route is a way or a road, BLM has relied upon a definition of the term "roadless" set forth in H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976). The distinction is an important one, because section 603(a) of FLPMA directs the Secretary to review roadless areas for wilderness characteristics, but does not prohibit vehicle routes other than roads from remaining in a WSA. 1/ The House Report states: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."

Appellant does not allege that the routes at issue have been maintained by mechanical means, nor that such maintenance has been unnecessary. Sierra Club, 62 IBLA 367, 369 (1982). In the absence of allegations of mechanical improvement and mechanical maintenance (or that such maintenance has been unnecessary), BLM's characterization of a route as a way will not be disturbed on appeal. National Outdoor Coalition, 59 IBLA 291, 299 (1981).

A different situation exists in the northern part of the WSA. Appellant echoes the allegations of the Square Butte Grazing Association that a road exists in secs. 7, 18, 19, 30, and 31, T. 25 N., R. 22 E., and sec. 7, T. 24 N., R. 22 E. Appellant also alleges that BLM built this road with caterpillars and road graders and repaired it in 1975 or 1976 with caterpillars and road graders to continue fence building and repair. BLM acknowledged that part of this vehicle route was indeed a road and cherrystemmed that part of it in secs. 7, 18, and 19, and the northernmost portion of sec. 30. It found, however, that beyond this cherrystemmed length, the road was no more than an old trail continuing into Squaw Creek. This trail, BLM stated, has not been maintained and does not show signs of regular and continuous use.

Our resolution of this identical issue in Square Butte Grazing Association, 67 IBLA 25 (1982), is applicable in the present case. Appellant's statement that the subject route is a BLM road constructed by mechanical

1/ If a vehicle route other than a road as, e.g., a way, were found by BLM to be a substantially noticeable imprint of man, Organic Act Directive 78-61, Change 2, requires BLM to consider adjusting the unit's boundary to exclude this imprint of man.

means and maintained by BLM by mechanical means indicates that the resolution of this issue is properly based on matters within the knowledge of BLM and appellant. BLM's decision is, accordingly, set aside as to this issue for preparation of a new decision addressing this disputed vehicle route. Inasmuch as appellant and BLM disagree primarily on the issue of maintenance, BLM is directed to review its records to determine whether all or any part of this route has been maintained by mechanical means. 2/ If all or part of this route has been maintained by mechanical means, BLM shall identify this length and state when maintenance was last performed mechanically and by whom. BLM shall also respond to appellant's statement that BLM performed mechanical maintenance on this route in 1975 or 1976. Justification for the cherrystemming of any route, or portion thereof, shall be clearly set forth. If part of a route satisfies BLM's "road" definition but another part lacks an essential element of the definition, only that part satisfying each element of the definition qualifies as a road. BLM may properly cherrystem such part. National Outdoor Coalition, supra; see also Sierra Club, supra, for a discussion of roads on which maintenance is shown to be unnecessary.

BLM's decision shall provide a right of appeal to appellant if he is adversely affected thereby. This decision will not be disturbed on appeal if appellant fails to meet its burden of pointing out specific errors of law or fact therein. Sierra Club, 54 IBLA 31, 37 (1981).

In both the Cow Creek and Antelope Creek units, appellant alleges that there exist reservoirs, fences, well sites, dams, and roads that show man's presence on the lands. Such impacts, appellant contends, contradict section 2(c) of the Wilderness Act, which defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain [and] an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation." The State Director acknowledged the presence of reservoirs, fences, and vehicle ways within the units, but described them as site specific disturbances whose overall effect was not significant enough to disqualify the units.

[2] The language quoted in the preceding paragraph from section 2(c) was the subject of a brief reference in the legislative history of the Wilderness Act:

> Section 2(b) [now 2(c)] defines wilderness in two ways: First, in an ideal concept of wilderness areas where the natural community of life is untrammeled by man, who visits but does not remain, and, second, as it is to be considered for the purposes of the act: areas where man's work is substantially unnoticeable,

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2/ Worksheet A, found in BLM's Cow Creek inventory file, indicates that the route traversing secs. 7, 18, 19, and 30 has been improved but has not been maintained. Absent information demonstrating that maintenance is unnecessary, Sierra Club, 62 IBLA 367, 369 (1982), a finding of mechanical maintenance is necessary to characterize a vehicle route as a road. Worksheet A appears to contradict BLM's characterization of part of this route as a road.

> where there is outstanding opportunity for solitude or a primitive and unconfined type of recreation, which are of adequate size to make practicable preservation as wilderness, and which may have ecological, geological, or other scientific, educational, scenic, and historical values. [Emphasis added.]

S. Rep. No. 109, 88th Cong., 1st Sess. 7-8 (1963). See also Idaho Cattlemen's Association, 63 IBLA 30, 33 (1982). Careful consideration of the second definition offered by section 2(c) reveals that Congress did not require that a wilderness area be free of all imprints of man. Instead, Congress required that an area generally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable. Indeed, in H.R. Rep. No. 95-540, 94th Cong., 2d Sess. 6 (1977), a report prepared to accompany H.R. 3454, 3/ there are listed several examples of intrusions which may be allowed in a designated wilderness area. Among these are trails, trail signs, bridges, fire towers, firebreaks, fire suppression facilities, pit toilets, fisheries enhancement facilities, fire rings, hitching posts, snow gauges, water quantity and quality measuring devices, and other scientific devices. Based on this guidance, BLM has set forth in its Wilderness Inventory Handbook examples of intrusions found on the public lands which, it finds, may be present within a WSA. These additional items include research monitoring markers and devices, wildlife enhancement facilities, radio repeater sites, air quality monitoring devices, fencing, and spring development.

As there is apparently no question that the lands contain imprints of man, appellant's objections to such imprints reduce to a disagreement with BLM as to whether such imprints are substantially noticeable. This question, of course, calls for a highly subjective determination by BLM. In Conoco, Inc., 61 IBLA 23, 27 (1981), we held that BLM's subjective judgment as to an area's naturalness qualities was entitled to considerable deference by this Board. We believe a similar holding is appropriate in the instant appeal. Inventory case files assembled by BLM evidence its firsthand knowledge of the lands at issue. In addition, BLM has received the benefit of numerous comments from individuals and groups of wide ranging interests. BLM's expertise and familiarity with the units on the ground entitle it, we believe, to our considerable deference in such subjective determinations. Appellant's views to the contrary, while not unreasonable, do not undermine this deference.

Finally, appellant charges that BLM's most recent map of the Cow Creek WSA does not show the additional cherrystemming 4/ which BLM claims to have done in sec. 19, T. 24 N., R. 23 E., and sec. 25, T. 24 N., R. 22 E. The map

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3/ This bill was later enacted as the Endangered American Wilderness Act, 16 U.S.C. § 1132 (Supp. II 1978).

4/ In National Outdoor Coalition, supra at 296, this Board held that BLM's cherrystemming practice, whereby lands occupied by roads or other intrusions are excluded from an inventory unit, was not contrary to law or any established Departmental policy.

which appellant includes in his statement of reasons appears identical to that which accompanied BLM's final inventory decision of November 1980. Inasmuch as the additional cherrystemming was added in response to protests following the final inventory decision, it is understandable that this map would not contain such cherrystems. BLM simply has not updated its map to reflect changes during the protest period. While State secs. 16 and 36 are included within the perimeter of the Cow Creek unit on BLM's map, this acreage will not be studied by BLM (WIH at 12 (Sept. 27, 1978)).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is affirmed in part, and set aside and remanded in part for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge